In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 941

JOHN A. CROSS, ET AL., PETITIONERS

v.

S. S. KAIMANA, HER ENGINES, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The issue in this case is whether employee benefit trusts hold "preferred maritime liens" for unpaid employer contributions and thus are entitled to priority over mortgage liens under Section 30 of the Ship Mortgage Act, 46 U.S.C. 953. Under the statute, such priority exists only if these contributions constitute "wages of the crew of the vessel." [1]

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[1] Section 30 provides in relevant part:

(a) When used hereinafter in this chapter, the term "preferred maritime lien" means * * * (2) a lien for

Under a collective bargaining agreement between various maritime unions and the Pacific Maritime Association, shipowners are obligated to contribute to certain trusts established for the purpose of providing welfare, pension and vacation benefits to seamen and specified categories of shoreside employees. The petitioners are the trustees of those trusts. Respondents, including the United States, hold preferred ship mortgages on the vessel against which petitioners attempt to assert the priority of a preferred maritime lien for the unpaid contributions.

Both courts below held that the employers' obligations to the trusts did not give rise to liens entitled to priority under the Ship Mortgage Act. This determination is correct and follows the uniformly accepted doctrine that contributions to pension, welfare, and vacation trust funds are not "wages of the crew of the vessel" for the purposes of Section 30. *Barnouw* v. *S. S. Ozark*, 304 F. 2d 717 (C.A. 5), certiorari denied *sub nom. Socony Mobil Oil Co., Inc.* v. *Wall Street Traders, Inc.*, 371 U.S. 923; *Brandon* v. *S. S.*

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damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, *for wages of the crew of the vessel,* for general average, and for salvage, including contract salvage.

(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit in rem in admiralty for the enforcement of a preferred mortgage lien thereon, * * * the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court. [Emphasis added.]

Denton, 302 F. 2d 404 (C.A. 5); *Irving Trust Co.* v. *The Golden Sail*, 197 F. Supp. 777 (D. Ore.); *The Kingston*, 1961 A.M.C. 1321 (S.D. Tex.). Such contributions are owed to the trustees, not to any seaman; a particular seaman has no direct interest in or right to the contributions made on his behalf, and he receives benefits even if his employer fails to contribute what is owed.[2]

This Court has held, most recently just last Term, that similar employer contributions to a union trust fund are not "wages * * * due to workmen" entitled to priority under Section 64(a)(2) of the Bankruptcy Act, 11 U.S.C. 104(a)(2). *United States* v. *Embassy Restaurant*, 359 U.S. 29 (pension, welfare, and vacation trusts); *Joint Industry Board of the Electrical Industry, et al.* v. *United States*, 391 U.S. 224 (employee annuity trust). There is no good reason why the virtually identical provisions of the two Acts having analogous purposes should be interpreted differently.

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[2] As the district court pointed out (Pet. App. 7-8), the amount of benefits received by a seaman from the trust is not necessarily the same as the employer contributions made on his account.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1969.

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